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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

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## No. 705

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JOSEPH Q. CIPRIANO,

Appellant,

*versus*

CITY OF HOUMA,
G. LESLIE BROUSSARD, Mayor,
CHRISTIAN L. OLIVIER, CHARLES DAVIDSON,
PETER BOURGEOIS, JR., SAMUEL LUSCO and
WILBERT P. BONVILLAIN,

Appellees.

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*On Appeal from the United States District Court for the Eastern District of Louisiana.*

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## *REPLY BRIEF ON BEHALF OF APPELLANT.*

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*May It Please the Court:*

I.

### *HARPER V. VIRGINIA STATE BOARD OF ELECTIONS IS CONTROLLING IN THE INSTANT CASE.*

The argument set forth in Part I of appellees' brief has been thoroughly controverted and answered in appellant's original brief, and appellant will not burden this Honorable Court with a repetitious argument in answer thereto. Suffice it to say that the case of *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 86 S. Ct.

1079, 16 L.Ed.2d 169 (1966), cited in our original brief, sets forth the correct rule that there must be a reasonable or rational basis for a State to adopt a statutory classification scheme limiting voting rights to a certain class of its citizens, such as property owning taxpayers, whether such election involves the election of officials for general governmental purposes or involves a local administrative election.

## II.

## *THE SUPREME COURT IS NOT REQUIRED TO GIVE ABSOLUTE PROSPECTIVE OR RETROSPECTIVE EFFECT TO A DECISION.*

Appellees, who agree with appellant that the decision of this Court in *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 60 (1965) is applicable in the instant case, clearly read a meaning and a system of categorization based upon a narrow rule of inflexible application into the decision that is not found in the language of the Court or supported by the general approach of the decision.

The question of whether a decision will be applied prospectively, or both prospectively and retrospectively, depends, under the holding in *Linkletter*, even in questions of constitutionality, on the facts and merits of each particular case. As was stated by Mr. Justice Clark in *Linkletter*, 381 U.S. 618, at 629:

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively; we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

In *Linkletter v. Walker, supra*, this Court refused to apply the decision in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct.

1684, 6 L.Ed.2d 1081 (1961), retrospectively to a criminal conviction that had become final before the *Mapp* decision was rendered. In the present case, the right of the appellant to seek a remedy before the courts had not expired at the time the appellant filed suit.[1] The bonds that were to be issued have not been sold. This case therefore stands in a position analogous to the position in which the *Mapp* case stood at the time it was presented to this Court. The remedies of the appellant, as in the case of the person convicted in Mapp, are not exhausted. There is no finality in the issuance of the bonds of the City of Houma, just as there was no finality in the criminal proceedings in Mapp. In the *Linkletter* case, the conviction had become final, and all remedies had been exhausted. This case would be similar or analogous to the *Linkletter* case only if the appellant had permitted the statutory period for attacking the bond election to expire without taking action.

Should this Court decide in favor of the appellant, Mr. Cipriano, the question of whether or not its decision would apply to bond elections retrospectively, or merely prospectively, would, it would appear, rest in the discretion of the Court. Counsel for appellant have no desire to infringe upon the Court's prerogatives. However, the issue of retrospective effect has, by force of the nature of the present case, been presented before the Court. Under the holding in the *Linkletter* case, the rational solution to the problem presented would be, should the Court decide in appellant's favor, to apply the decision retrospectively, if you will, in all cases in which the issuance of bonds has not become final, or the rights of the issuing governmental body or agency, and of the bondholder, have not become

[1] Under the applicable provisions of Louisiana law, the appellant was given sixty days from the date of promulgation of the result of the bond election within which to contest the legality of the election. Louisiana R.S. 33:4260. The appellant, Mr. Cipriano, filed suit within this time.

vested, and to refuse relief in all cases in which the matter has become final or rights have become vested. As the *Linkletter* decision indicates, retrospective effect rests largely upon the merits of each particular case. It is impossible at the present time to foresee all possible situations that might arise, or to suggest an application of the Linkletter approach in more explicit detail. It is sufficient to say that, in appellant's view, a decision favorable to appellant in this case should apply in all cases in which rights have not become vested and the proceedings have not become final.[2] And appellant should point out that appellant is not requesting for himself, as a person contesting a bond election, greater rights or remedies than future litigants would have, as in the present case no rights have become vested and the proceedings have not become final.

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[2] The obvious dire consequences which may ensue from a retrospective application of the Reapportionment Cases is sufficient reason under the *Linkletter* rule that a pure prospective effect be given to those decisions. Unlike those cases, there are no dire consequences nor any impairment of vested rights which can result from a decision of the Court granting appellant the relief he seeks, and giving such a decision, in accordance with the *Linkletter* rule, the effect suggested by appellant. *Allen v. State Board of Elections*, Nos. 3, 25, 26 and 36 — October Term, 1968; 89 Ct. 817 (1969), cited by appellees, while not inconsistent with the rationale of *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965), is factually inapposite to the instant case.

## III.

## *A STATE LEGISLATURE CANNOT VALIDATE STATE ACTION UNDER A STATE STATUTE WHICH IS VIOLATIVE OF THE UNITED STATES CONSTITUTION.*

Appellees in their brief contend that the issuance of the $10 million of revenue utility bonds approved by the property owners of the City of Houma was validated by the following paragraph contained in Act No. 33 of the Extra Session of the Louisiana Legislature of 1968, amending Louisiana R.S. 33:4258:

> "In the event a property taxpayers' election has heretofore been held and promulgated approving the issuance of bonds under this Subpart, as contemplated in subparagraph (2) above, the governing body may proceed with the issuance and sale of such bonds without complying with the provisions of this section and without any further election approval."

No mention is made in the quoted paragraph either of the validation of a contested bond election or of the validation of the issuance of bonds thereunder. All that the paragraph does is provide that the enactment of the amended statute does not interfere with the issuance of bonds voted under the statute as it stood before amendment. If, for example, the amended section were in any respect narrower than the earlier statute or imposed requirements not imposd by the earlier statute, the governing body could proceed with the issuance of bonds that had been voted, notwithstanding the fact that the statute, by implication, imposes a requirement not found in the statute as it stood before amendment, that, before proceeding to the holding of a bond election, the governing body shall "elect(s)" (Louisiana R.S. 9:4258 as amended, paragraph "(2)") "at (its) discretion" (Louisiana R.S. 9:4258 as amended,

introductory paragraph) whether the bond issue shall be submitted to all qualified electors or to property taxpayers. The entire paragraph quoted above appears to have been placed in the amended statute as a safeguard, from the standpoint of draftsmanship, to prevent an attack on a bond election held under the former statute from being made under the contention that the enactment, in itself, of the amended section, or the substantial effect of the amended statute, rendered all bond elections held under the former statute invalid. The quoted paragraph contains nothing that would indicate that it would validate a contested bond election.

If any part of the amended statute would have the effect of validating the bond election contested in this case, it would be the paragraph that follows the paragraph originally quoted:

> "All bonds heretofore issued under the provisions of this Subpart are hereby validated, ratified and confirmed and declared to be valid and binding obligations of the municipal corporation in accordance with the terms of their issuance in spite of any one or more irregularities which may have occurred in the passage of this Subpart or question which might be raised as to the constitutionality of any procedural provision of this Subpart. All proceedings heretofore had in connection with the issuance of such bonds are hereby ratified, validated and confirmed."

The quoted paragraph purports to validate all bonds heretofore issued, and all proceedings in the connection with the issuance of "such bonds". However, in the case presented before this Court, the utility revenue bonds of the City of Houma have not been issued (appellees' brief, p. 14). Therefore, although the paragraph of the amended statute last quoted in certain cases has, or purports to have,

the effect of validation (unlike the paragraph first quoted), it applies only to "bonds heretofore issued" and to proceedings in connection with the issuance of "such bonds" (meaning bonds heretofore issued). The quoted paragraph has no application to bonds that have not been issued. Furthermore, it is extremely doubtful that bond elections can be relegated to the status of ". . . proceedings in connection with the issuance of . . . bonds . . .", or that bond elections were intended to be included within that phrase. It would appear that the quoted phrase would be intended to include only matters of smaller significance.

The amendment of Section 4258 of Title 33 of the Louisiana Revised Statutes of 1950 therefore neither had nor purported to have the effect of validating the bond election called by the governing body of the City of Houma. Assuming, however, for purposes of alternative argument, that the amendment had the effect that appellees contend it had, of purporting to validate bond elections in which rights granted citizens of the United States under the Fourteenth Amendment of the Constitution of the United States were violated, then the amendment is unconstitutional. Appellant contends that the statute was unconstitutional because it limited the right to vote in a bond election to property taxpayers when property ownership did not furnish a rational basis on which to distinguish between the rights of property taxpayers and the general electorate. It is the election involving the denial of rights guaranteed under the Fourteenth Amendment which appellees contend was validated by legislative enactment. To so contend is to attempt to place an enactment of a state legislature on an equal level with the United States Constitution. We do not contend that the states should be denied the rights properly reserved to or accorded to them. But states do not have the power to render constitutional by enactments of their legislatures statutes that are un-

constitutional, or to validate by enactments of their legislatures state actions which in themselves denied constitutional rights and which were undertaken under unconstitutional statutes. The statute challenged by appellant is unconstitutional, and the state action undertaken under the statute was in itself an unconstitutional denial of the rights of the citizens of the United States, and neither the statute nor the action undertaken under it can be validated by legislative decree. To hold otherwise would upset not only the Federal system but also the traditional American constitutional framework of the separation of powers.

## *CONCLUSION*

For the foregoing reasons, it is respectfully submitted that the Judgment of the Court below should be reversed and that the provisions of the Constitution and statutes of the State of Louisiana which require the ownership of property and the payment of taxes thereon as a condition of voting in revenue bond elections in Louisiana be declared in violation of the Constitution of the United States and particularly the Fourteenth Amendment thereof and therefore null and void.

It is further respectfully submitted that the election held in Houma, Louisiana on October 24, 1967, be declared null and void and without effect and that an injunction issue against all named defendants, or their successors in office, enjoining the said parties from enforcing, administering or giving any effect to the cited provisions of the Constitution and Statutes of Louisiana.

Respectfully submitted,

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*Counsel for Appellant.*

## CERTIFICATE

I hereby certify that a copy of the foregoing Reply Brief for the Appellant has been served on opposing counsel of record by depositing such in the United States Mail, postage pre-paid, addressed to their addresses of record.

Houma, Louisiana, April ....., 1969.

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KENNETH WATKINS